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Supreme Court, U. S.
FILED
APR 23 1952
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 733

IRENE MOSES, Claimant,
Petitioner,

ONE 1949 PONTIAC SEDAN,
Motor No. P-8RH10913, Libellee,

vs.

UNITED STATES OF AMERICA, Libellant,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Irene Moses, claimant, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered in the above entitled cause on February 21, 1952 reversing, by a divided court, a judgment of the United States District Court for the Northern District of Illinois in favor of the claimant.

OPINIONS BELOW.

The trial court filed an opinion (R. 49-54) which is not reported. The opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R. 75-83) has not been reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals sought to be reversed was entered on February 21, 1952 (R. 75). Petitioner did not file a Petition for Rehearing. The jurisdiction of this Court is invoked under U. S. C. Title 28, Sec. 1254 (1).

QUESTIONS PRESENTED.

1. Whether a vehicle can be forfeited solely upon presumptions where the defendant is an inanimate object incapable of negation of the presumptions.

2. Whether Section 2553, Title 26 U. S. C. (a criminal statute) which provides that the absence of appropriate revenue stamps on narcotics raises a presumption that the narcotics were unlawully purchased is applicable against an inanimate object in a civil forfeiture proceedings.

3. Whether "probable cause" as used in Section 1615, Title 19 U.S.C. can be established by mere guess, surmise, suspicion or conjecture.

4. Whether the finding of fact of the trial court that there is no "probable cause" is clearly erroneous where the culpability of the vehicle is predicated solely upon the testimony of a government agent that:

(a) When he entered the first floor of a residence to be searched the automobile sought to be forfeited was not in a sight,

(b) After the search had been in progress for a period of thirty minutes or more a person entered the premises being searched and narcotics and keys to the automobile were found on his person, and

(c) Shortly thereafter the automobile was seen parked in the street in the vicinity of the premises being searched.

STATUTES INVOLVED.

The statutes involved are:

U.S.C., Title 19, Section 1615.
U.S.C., Title 20, Sections 174.
U.S.C., Title 26, Section 2553 (a).
U.S.C., Title 28, Section 1355.
U.S.C., Title 28, Section 2461.
U.S.C., Title 49, Section 781 (a).

They appear in the appendix, pp. 1a to 3a.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In reversing the judgment of the District Court.

2. In holding that the findings of fact of the trial court were "clearly erroneous."

3. In failing to hold that the presumption set forth in Title 26, U.S.C., Section 2553 is inapplicable and could not be relied upon by the libellant in this civil proceedings for the forfeiture of this vehicle.

4. In holding that "probable cause" for the institution of this proceedings for forfeiture was established by presumptions predicated solely upon guess, conjecture and speculation.

5. In failing to hold presumptions can not be invoked against an inanimate defendant incapable of rebutting the presumptions.

STATEMENT OF THE CASE.

The libel of information filed against the 1949 Pontiac Sedan alleged that the vehicle was seized by narcotic agents; and that the vehicle was used for the purpose of the transportation, carriage or conveyance, or for the concealment or possession, or for the facilitation of the transportation, carriage or conveyance, concealment, receipt or possession, sale or barter or exchange or giving away of a contraband article, namely, 40 tablets of morphine sulphate.

The libel further alleged that the morphine sulphate was a contraband article within the meaning of the Supplemental Forfeiture Act of 1939 (Title 49 U.S.C., Sections 781-788) on the ground that the said morphine sulphate was not purchased in the original stamped package or from the original stamped package, contrary to the provisions of Title 26 U.S.C. Section 2553, and on the ground that the said morphine sulphate had been imported or brought into the United States contrary to the provisions of Title 21 U.S.C. Section 174, and contrary to the regulations of the Treasury Department. (R. 3-5). The libel also alleged that the said vehicle was in the possession and control of Marvin Moses at the time and place of seizure. The libel prayed that the vehicle be decreed forfeited to the United States of America. (R. 5).

Thereafter the claimant, Irene Moses, filed an answer and intervening claim alleging that she was the owner of the said vehicle and denied all material allegations of the libel. (R. 5-7).

At the trial the parties entered into the following stipulation of an agreed statement of the testimony which would be elicited at the trial, each party reserving the right to introduce additional testimony not inconsistent with the stipulation. (R. 8-11):

"Pursuant to a valid and subsisting search warrant issued by the United States Commissioner for this district and division, and pursuant to a legal and valid execution of the said warrant, narcotic agents Benedict Pocoroba, Frank A. Sojat and E. P. Gross, Bureau of Narcotics, Chicago, Illinois, on May 5, 1949, searched the premises particularly described in the said warrant as 6223 Champlain Avenue, Chicago, Illinois, first floor, after the warrant had been read to one Mrs. Mary White, who admitted the aforesaid agents to the premises described above. During the search the said agents discovered a steamer trunk containing 1486 grains of heroin in capsules and bulk, 1½ ounces of heroin in a glass jar, and 2800 grains of cocaine in capsules and bulk.

"In the process of this search one Marvin Moses entered the premises described above, and after he had identified himself to the said agents as Marvin Moses, and after he admitted to the agents sole ownership of the steamer trunk and the contents thereof, he was put under arrest.

"Immediately after he was told by the agents aforesaid that he was under arrest, he was searched by them, and they found in one of the pockets of his sport coat which he was then wearing, and which he wore when he entered the premises aforesaid, 40 tablets of morphine sulphate. The morphine sulphate aforesaid is the same morphine which forms the subject matter of the chemist's report attached hereto and made a part hereof—as if set forth *in haec verba*. Said morphine sulphate is also the same morphine sulphate referred to in the libel filed in this case" (R. 8-11).

It was also stipulated that the intervening claimant owned the vehicle sought to be forfeited and was the wife of Marvin Moses. (R. 11).

A Federal Narcotic Agent (Frank Sojat) testified that before he and another agent entered the premises at 6223 Champlain Avenue, they looked on both sides of the street for a distance of at least ¾ of a block and did not see the automobile in question. (R. 12-13) The parties stipulated that if the other Narcotic Agent (Benedict Pocoroba) were called to the stand, he would testify that he was familiar with what the automobile looked like, that he knew that Marvin Moses had a Pontiac Car, and that he looked up and down the street before entering the premises that morning and did not see the car. (R. 25, 26)

When Agent Sojat asked Marvin Moses how he came to the premises at 6223 Champlain Avenue, Marvin Moses answered that he had just driven up in his car and pointed out the front window towards the automobile in controversy, which was parked outside on the street in the vicinity of the Champlain Avenue premises. (R. 22) The answer to Agent Sojat's question was elicited immediately after Moses had been searched and put under arrest by the narcotic agents but between thirty to forty five minutes after they entered the premises. (R. 13) Agent Sojat also testified that Moses had on his person keys to the Pontiac. (R. 22)

The conversation between Agent Sojat and Marvin Moses was objected to by the intervening claimant as "hearsay" and inadmissible in evidence especially where "the defendant was an inanimate object incapable of defending itself. (R. 13-21)

Further testimony on the part of Agent Sojat revealed that the forty tablets of morphine sulphate were in a pasteboard box, and did not have any stamps of any kind upon it. Objection was made to this evidence on the ground that the government was attempting to raise from this testimony the presumption of criminality against the vehicle. The government relied upon the presumption of unlawful purchase as raised by Section 2553 (a) Title 26 U.S.C. by the absence of tax paid stamps. The intervening claimant contended that this presumption can be raised only in a criminal case. (R. 24) and never against an inanimate object in a proceedings *in rem* to forfeit property.

The trial court allowed the conversation between Moses and Agent Sojat and the testimony with regard to the lack of stamps on the narcotics to be received subject to its reservation of ruling upon the questions raised by the objections. (R. 21, 24).

Agent Sojat further testified that immediately after the search of the Champlain Avenue premises, Moses was taken into custody and the automobile seized. (R. 24). It was stipulated that if Agent Pocoroba were called to the stand, his testimony would corroborate the testimony of Agent Sojat subject to the same objections made by the intervening claimant to Agent Sojat's testimony. (R. 25-26) On cross-examination Agent Sojat testified that the government did not have a search warrant for the car, and that the agents went to the premises to search them, and not to look for an automobile.

The government then rested and the intervening claimant moved the court for a finding in her favor and a dismissal of the libel. The court reserved ruling upon the motion. The claimant elected to stand upon her motion

for a finding in her favor made at the close of the government's case, and offered no evidence in her own behalf (R. 26).

The trial court found that there was no competent evidence that Marvin Moses ever rode in the Pontiac or that if he did ride in the car, he carried with him the narcotics found on his person and that there was no proof of any of the allegations in the complaint, namely that:

> "(a) The said morphine sulphate was not purchased in the original stamped package or from the original stamped package as required by law contrary to the form and manner of the statutes of the United States of America in such case provided, and contrary to regulations of the Treasury Department; and
>
> (b) The said morphine sulphate was by the said Marvin Moses fraudulently and knowingly imported or brought into the United States contrary to law or the said Marvin Moses assisted in so doing or received, concealed, bought, sold or facilitated the transportation, concealment or sale of said morphine after being imported or brought in knowing the same to have been imported contrary to the form and manner of the statutes of the United States so provided; and
>
> (c) The said morphine was transported, carried or conveyed in and upon, or by means of said Pontiac Sedan, or that the said morphine was concealed or possessed in or upon said Pontiac Sedan, or upon the person of anyone in and upon said Pontiac Sedan, or that the said Pontiac Sedan was used to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of said morphine contrary to the form and manner of the statutes of the United States so provided." (R. 56).

The Trial Court also found that there was no probable cause for the seizure of the automobile or the institution

of the forfeiture proceedings; that it was unlawfully seized and should not be forfeited and entered an Order requiring the Marshal to deliver the car to the claimant. (R. 56-57).

Both the majority opinion of the Circuit Court of Appeals and the dissenting Opinion of the Chief Judge held that the conversations between Moses and the government agent were clearly "hearsay" and inadmissible to prove the culpability of the automobile. The majority opinion, however, reversed the trial court solely upon the ground that the finding of the trial court that "there was no probable cause for the seizure of the automobile" was clearly erroneous as a matter law. (R. 82). The Chief Judge, in his dissenting opinion, said:

> "With the exclusion of this (inadmissible) evidence, there remains nothing against the car. But even if it be accepted, its connection with the car rests upon nothing more than guess or speculation." (R. 82).

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

Probable cause is a question of fact for the trial court and the Circuit Court of Appeals erred in holding the decision of the trial court on this question clearly erroneous.

Section 1615 Title U.S.C. 19 provides that the question of probable cause shall *be judged by the court.* The statute specifically provides that the probable cause sufficient to shift the burden of proof to the claimant is the *probable cause existing at the time of the institution of the proceedings for forfeiture and not the probable cause that may have existed for the seizure.* There is a difference between the probable cause that might exist in the mind of an inexperienced or perhaps overzealous officer making an arrest or seizure and the cold deliberation required of a United States District Attorney after the evidence is presented to him and before he files a proceedings to deprive an innocent owner of his property. "Probable Cause" to seize an article is not the same as the probable cause sufficient to warrant the institution of a forfeiture proceedings. Probable cause to seize a vehicle has been defined as something less than sufficient evidence to forfeit the vehicle (*Agnew* v. *Haymes,* 4 Cir., 141 Fed. 631) while the probable cause sufficient to shift the burden of proof in a forfeiture proceedings is something less than a *'prima facie'* case. (*United States* v. *One Sorrel Horse,* 27 Fed. Cas. 315). It cannot rest upon suspicion or conjecture (*Brinegar* v. *United States,* 338 U.S. 160).

Conjecture, suspicion or surmise may be sufficient to relieve an officer from liability for the wrongful seizure

of a vehicle but it is not enough to warrant the institution of an action in libel. The reason is obvious. An officer at the time of a seizure must act instantaneously but ample time is afforded an official to reflect and determine if he has real, substantial and competent evidence to support a libel if one is to be filed. Under any circumstances the question of probable cause becomes a question of law only when all reasonable minds can come to only one conclusion. As long as a doubt remains the question of probable cause is one of fact for the trial court.

The trial court heard the witnesses testify, noted their demeanor on the witness stand and from all of the circumstances presented in the case at bar, found that "there was no probable cause" for the institution of the proceeding. (R. 56) The finding of the court that there was no probable cause has the weight of a verdict of a jury. (*United States* v. *One Bag of Paradise Feathers,* 2 Cir. 256 Fed. 301; *United States* v. *One Pearl Chain,* D.C. N.Y., 139 Fed. 510, affirmed 2 Cir. 139 Fed. 513). The weight and sufficiency of the testimony of the agents and the credence given to it was a question of fact for the trial court. Rule 52A of Federal Rules of Civil Procedure provides that findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. On appeal the Appellate Courts do not retry the case. The findings of fact as found by the trial court are deemed correct and will not be set aside unless based upon an erroneous view of the law. (*Coleman* v. *United States,* C.C.A. D.C. 176 F. 2d 469; *Fleming* v. *Pandzer Lumber Co.,* 7 Cir., 162 F. 2d 276). The party who attacks the trial court's findings must show that they are clearly wrong. (*Grace Bros., Inc.* v. *Comm. of Int. Rev.,* 9 Cir., 173 F. 2d. 170). Where there is no dispute about the facts

but different and reasonable inferences may be fairly drawn from the evidence, a court of appeals is forbidden to disturb findings of fact unless they are clearly erroneous. (*Tenn. Coal, Iron & R. Co.* v. *Muscoda Local No. 123,* 5 Cir., 137 F. 2d. 176). The mere fact that on the same evidence another court might reach a different result does not justify an appellate court in settling aside the findings of a trial court. (*Nee* v. *Lindwood Securities Co.,* 8 Cir., 174 F. 2d. 434)

The Circuit Court of Appeals necessarily held that solely from the facts (1) Marvin Moses had in his possession certain narcotics and keys to the car when searched; (2) that the Pontiac was not seen by the officers when they entered the premises for the purpose of making the search and (3) that it was in front of the premises shortly after Marvin Moses entered the premises raises the inferences (1) that Marvin Moses came to the premises in the Pontiac and (2) that the morphine found in his pocket was on his person when he drove the car. From these vague inferences claimant was deprived of her property.

The majority opinion cites the case of *United States* v. *Davidson,* 1 Cir., 50 F. 2d. 517, and the case of the *United States* v. *Blackwood,* 1 Cir., 47 F. 2d. 849 in support of their holding that there was probable cause for the institution of the libel in the case at bar. The facts in these cases were so dissimilar to the facts in the case at bar that they cannot be considered authority for the reversal of the judgment of the trial court.

In the *Davidson* case the "Eaglet" was sought to be forfeited under an information consisting of two counts. The first count charged *that the vessel was a pleasure vessel* and was engaged in the transportation of merchan-

dise for pay contrary to the provisions of the customs law. The second count charged that the vessel was employed in the trade of unlawfully transporting intoxicating liquors in violation of the then existing prohibition act. The evidence showed that the "Eaglet" was observed running without lights into the docks at Fall River; that immediately thereafter trucks were observed on the dock beside the slip and men were seen unloading sacks from the vessel into trucks. A coast guard vessel threw search lights on her, attempted to enter the slip where she was anchored and when twenty feet away fired one blank shot from her gun as a signal for the "Eaglet" to "stand to." Instead of "standing to" the "Eaglet" got on her way and collided with a coast guard ship. As she slipped away the men on board were seen throwing sacks overboard into the slip. She was pursued by the coast-guard vessel and ran aground. She was found the following morning by the coast guard vessel in the Kikenmuit River. At the point where she was found, two hundred and forty three sacks were taken from the bottom of the river. Two days later at a point where the crew of the "Eaglet" was seen unloading sacks, seven similar sacks were found containing whiskey. Certainly this is a far cry from the inconclusive and conjectural evidence presented in the case at bar.

The *Blackwood* case is even stronger on its facts than the *Davidson* case. A careful analysis of the *Blackwood* case shows that it was reversed because the trial court instructed the jury that the burden of proof was upon the government notwithstanding that probable cause for the seizure was established.

In the case of *Locke* v. *The United States,* 11 U.S. 339, 7 Cranch 560 cited by the majority opinion, the libel was predicated upon a charge that foreign goods were im-

ported without a permit. In the *Locke* case the names of fictitious shippers were used. The goods were not regularly entered at the custom house. They were unaccompanied by certificates of paid duty. The original markings were altered.

In this case this Court held that probable cause might be established upon a well founded suspicion and sustained the trial court's holding that there was probable cause because under the statute probable cause "was to be judged by the court". The majority opinion in the case at bar conceded that the criterion of "suspicion" is no longer the test. (*Brinegar* v. *United States,* 338 U.S. 160)

II.

Presumptions cannot be raised against an inanimate defendant.

Inferences are not evidence. They are accepted in lieu of evidence for the reason that the person against whom the inference is taken is in a position to negative the inference while the opposition cannot ordinarily prove the ultimate fact inferred. It naturally follows that the reason for the rule fails in the case at bar for the defendant is an inanimate object and cannot rebut a presumption. A rule should not extend beyond the reason for its existence.

In the case of the *United States* v. *One Nash Coupe D. C. Ill.,* 47 F. 2d. 249, Roberts was indicted and convicted in the District Court for unlawful dealing in morphine hydrochloride. Upon the charge that the drug had been unlawfully introduced into the United States without payment of custom tax imposed thereon and that it had been transported in Roberts' automobile an information of libel was filed to forfeit the automobile. The government

put in testimony which clearly established (1) that the morphine was seized from the defendant, Roberts; (2) that the drug complained of was transported several blocks in the automobile on the front seat near Roberts who operated the automobile; (3) that the morphine was not in its original package and (4) that it was not marked "duty paid." The government relied as they did in the case at bar upon the presumption created by statute which provided in effect that when the defendant is shown to have or have had possession of narcotic drugs such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. (Title 19 U.S.C. Section 174). In this case former Circuit Judge Alschuler of the Seventh Circuit sitting in the District Court, refused to entertain the presumption against a motor vehicle although he held the presumption valid as against a living defendant. Similarly in the case of *United States* v. *One Studebaker Roadster,* D. C. Tenn. 40 F. 2d. 557 the court held that while inferences and presumptions are valid as against an individual they cannot be used against a motor vehicle sought to be forfeited. These cases were followed with approval in *United States* v. *One Oldsmobile Club Coupe,* D. C. Conn., 33 F. Supp. 848.

The inferences sought to be raised in the instant case are predicated upon acts occurring after the alleged act of transporting the narcotics in the automobile. An inference to be considered in lieu of evidence must be prospective, not retrospective. The narcotics that Moses had in his possession when arrested cannot be presumed to have been in his possession when and if he drove to the premises being searched. Neither does the fact that the keys to the Pontiac car found in his possession when arrested create an inference that he drove the automobile nor that

the narcotics were in his possession if and when he so drove the vehicle. The existence of a fact is not proven by evidence of a subsequent condition which is merely consistent with its existence. (*Waters-Pierce Oil Co.* v. *Van Elderen,* 8 Cir., 137 Fed. 557).

III.

The presumptions created by Title 26 U.S.C. Section 2553 are inapplicable to an inanimate defendant.

The libel in this case is predicated solely upon and specifically charges:

1. "The said morphine sulphate was not purchased in the original stamped package or from the original stamped package as required by law contrary to the form and manner of the statutes of the United States of America in such case provided, to wit, 26 U.S.C., Section 2553 and contrary to the regulations of the Treasury Department." (Tr. 3) and that

2. "The said morphine sulphate was by the said Marvin Moses fraudulently and knowingly imported or brought into the United States contrary to law or the said Marvin Moses assisted in so doing or received, concealed, bought, sold or facilitated the transportation, concealment or sale of said morphine after being imported or brought in knowing the same to have been imported contrary to form and manner of the statutes of the United States so provided, to wit, 21 U.S.C., Section 174 (Tr. 4).

The government failed to establish "reasonable and probable cause" based upon either of these allegations. The government did not make out the case alleged in its libel (*United States* v. *One Nash Coupe,* D. C. Ill. 47 F. 2d. 249); The contention of the government that morphine not contained in its original package is declared a contra-

band under the Supplemental Forfeiture Act of 1939, does not relieve it of its duty of proving the specific allegations of its libel. Proof that the morphine was not found in its original stamped package does not prove that it was fraudulently and knowingly imported into the United States contrary to law or purchased illegally as alleged. There is neither evidence nor inferences in this record to prove the allegation upon which the libel is predicated.

IV.

The question herein involved deals with fundamental property rights and is of far reaching important.

The Circuit Court of Appeals deprived this petitioner of her property by means of an inapplicable statutory presumption. The Circuit Court of Appeals has adopted a statutory presumption applicable only to a criminal proceedings and applied it to a civil proceeding *in rem*. Its decision is in conflict with the decisions in other judicial circuits, so as to call for an exercise of this Court's supervision. In this case an innocent owner of a vehicle was deprived of her property even though the trial court found there was no evidence of "probable cause for its seizure".

The Circuit Court of Appeals reversed the trial court solely on this question. Its decision is contrary to the statute which specifically makes the trial court the judge of the existence or non-existence of probable cause and invokes a presumption contrary to our basic conceptions of law and justice.

The decision of the Chief Judge of the District Court is supported by the dissenting opinion of the Chief Judge of the Circuit Court of Appeals. The majority opinion is contrary to the decision of former Seventh Circuit

Judge Alschuler in the case of *United States* v. *One Nash Coupe,* D. C. Ill. 47 F. 2d 249 and the cases of *United States* v. *One Studebaker Roadster,* D. C. Tenn. 40 F. 2d 557 and *United States* v. *One Oldsmobile Club Coupe,* D. C. Conn. 33 F. Supp. 848, which held that the libellant may not rely upon statutory provisions similar to Section 2553(a) Title 26 U.S.C. to establish probable cause for the institution of forfeiture proceedings.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that a writ of certiorari shall be granted.

Respectfully submitted,

ALFRED E. ROTH,
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April 21, 1952.

APPENDIX.

Statutes Involved.

U. S. C. Title 19.

Section 1615: Burden of proof in forfeiture proceedings.

In all suits or actions brought for the forfeiture of any vessel, vehicle, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, merchandise, or baggage, because of violation of any law, the burden of proof shall be upon the defendant: Provided, That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court, subject to the following rules of proof:

(1) The testimony or deposition of the officer of the customs who has boarded or required to come to a stop or seized a vessel or vehicle, or has arrested a person, shall be prima facie evidence of the place where the act in question occurred.

(2) Marks, labels, brands, or stamps, indicative of foreign origin, upon and accompanying merchandise (sic) or containers of merchandise, shall be prima facie evidence of the foreign origin of such merchandise.

(3) The fact that a vessel of any description is found, or discovered to have been, in the vicinity of any hovering vessel and under any circumstances indicating contact or communication therewith, whether by proceeding to or from such vessel, or by coming to in the vicinity of such vessel, or by delivering to or receiving from such vessel any merchandise, person or communication, or by any other means effecting contact or communication there-

with, shall be prima facie evidence that the vessel in question has visited such hovering vessel. (June 17, 1930, c. 497, Title IV,—615, 46 Stat. 757; Aug. 5, 1935, c. 438, Title II,—207, 49 Stat. 525.

U. S. C. Title 21.

Section 174. Same; penalty; evidence. If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 or imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. (June* 9, 1909, c. 100,—2, 35 Stat. 614; Jan. 17, 1914, c. 9, 38. Stat. 275 May 26, 1922, c. 202,—1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657.) "June" should read "Feb.")

U. S. C. Title 26.

Section 2553. Packages

(a) General Requirement. It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

U. S. C. Title 28.

Section 1355. Fine, penalty or forfeiture

The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress. June 25, 1948, c. 646, 62 Stat. 934.

U. S. C. Title 28.

Section 2461. Mode of Recovery

(a) Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action.

(b) Unless otherwise provided by Act of Congress, whenever a forfeiture of property is prescribed as a penalty for violation of an Act of Congress and the seizure takes place on the high seas or on navigable waters within the admiralty and maritime jurisdiction of the United States, such forfeiture may be enforced by libel in admiralty but in cases of seizure on land the forfeiture may be enforced by a proceeding by libel which shall conform as near as may be to proceedings in admiralty. June 25, 1948, c. 646, 62 Stat. 974.

U. S. C. Title 49.

Section 781. Unlawful use of vessels, vehicles, and aircrafts; contraband article defined.

(a) It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband article in or upon vessel, vehicle or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.

(b) As used in this section, the term "contraband article" means—

(1) Any narcotic drug which has been or is possessed with intent to sell or offer for sale in violation of any laws or regulations of the United States dealing therewith; or which has been acquired or is possessed, sold, transferred, or offered for sale, in violation of any laws of the United States dealing therewith; or which has been acquired by theft, robbery, or burglary and carried or transported within any Territory, possession, or the District of Columbia, or from any State, Territory, possession, the District of Columbia, or the Canal Zone, to another State, Territory, possession, the District of Columbia, or the Canal Zone; or which does not bear appropriate tax-paid internal-revenue stamps as required by law or regulations * * *.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 733

IRENE MOSES, Claimant of One 1949 Pontiac Sedan, Motor No. P-8 RH 10913, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals (R. 75-82), are reported at 194 F. 2d 756.

JURISDICTION

The judgment of the Court of Appeals was entered on February 21, 1952 (R. 83). The petition for a writ of certiorari was filed April 23, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there was "probable cause" to institute libel proceedings against this particular automobile for having been used to transport narcotics unlawfully obtained.

STATUTES INVOLVED

The Supplemental Forfeiture Act of August 9, 1939, 53 Stat. 1291-1293, as amended by the Act of August 9, 1950, 64 Stat. 427, 49 U.S.C. 781-788, provides in pertinent part:

Section 1:

> (a) It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft, or upon the person of any one in or upon any vessel, vehicle, or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.
>
> (b) As used in this section, the term "contraband article" means—
>
> (1) Any narcotic drug which has been or is possessed with intent to sell or offer for sale in violation of any laws or regulations of the United States dealing therewith; or which has been acquired or is possessed, sold, trans-

ferred, or offered for sale, in violation of any laws of the United States dealing therewith; or which has been acquired by theft, robbery, or burglary * * * ; or which does not bear appropriate tax-paid internal-revenue stamps as required by law or regulations;

* * *

Section 2:

Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of section 1, or in, upon, or by means of which any violation of section 1 has taken or is taking place, shall be seized and forfeited * * * .

Section 4:

All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels and vehicles for violation of the customs laws; the disposition of such vessels and vehicles or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this Act, insofar as applicable and not inconsistent with the provisions hereof * * * .

Section 615 of the Tariff Act of 1930, 46 Stat. 757, as amended by Section 207 of the Anti-Smuggling Act, 49 Stat. 525-526, 19 U.S.C. 1615 provides:

> *Burden of Proof in Forfeiture Proceeding.* In all suits or actions brought for the forfeiture of any vessel, vehicle, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant * * *: *Provided,* That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court, subject to the following rules of proof:
>
> (1) The testimony or deposition of the officer of the customs who has boarded or required to come to a stop or seized a vessel or vechicle, or has arrested a person, shall be prima facie evidence of the place where the act in question occurred.
>
> (2) Marks, labels, brands, or stamps, indicative of foreign origin, upon or accompanying merchandise or containers of merchandise, shall be prima facie evidence of the foreign origin of such merchandise.
>
> (3) The fact that a vessel of any description is found, or discovered to have been, in the

> vicinity of any hovering vessel and under any circumstances indicating contact or communication therewith, whether by proceeding to or from such vessel, or by coming to in the vicinity of such vessel, or by delivering to or receiving from such vessel any merchandise, person, or communication, or by any means effecting contact or communication therewith, shall be prima facie evidence that the vessel in question has visited such hovering vessel.

Section 2553(a) of the Internal Revenue Code, 26 U.S.C. 2553(a):

> It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

Section 2 of the Act of February 9, 1909, 35 Stat. 614, as amended, 21 U.S.C. 174, provides:

> If any person fraudulently or knowingly imports or brings any narcotic drug into the United States * * * contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT

Under the Supplemental Forfeiture Act of 1939 (*supra,* pp. 2-3), any vehicle used to transport contraband, including illegally acquired narcotics, is subject to seizure and forfeiture. The burden of proving that there is no right to forfeiture is on the claimant of the seized article, provided only that the Government first show probable cause for the institution of the proceeding.[1]

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[1] This burden is imposed by Section 207 of the Anti-Smuggling Act (19 U.S.C. 1615), which is made applicable to seizure under the Supplemental Fofeiture Act by Section 4 of that Act (*supra,* p. 3).

On August 22, 1949, the United States filed a libel against One 1949 Pontiac Sedan, Motor No. P-8RH10913, charging, *inter alia,* that the car was used for the transportation of narcotics which were contraband in that they were "not purchased in the original stamped packages or from the original stamped packages as required by law * * * ." (R. 3-5.)[2]

On the trial, the evidence of the Government, consisting partly of the testimony of United States narcotic agent Sojat, and partly of stipulations between the Government and petitioner, was in substance as follows:

On May 5, 1949, three United States narcotics agents, Sojat, Pocoroba, and Gross, proceeded to 6223 Champlain Avenue, Chicago, Illinois, for the purpose of executing a search warrant (R. 10). Before entering the premises Sojat and Pocoroba scanned both sides of the street for a distance of about three-quarters of a block to determine whether a certain green 1949 Pontiac sedan, libellee herein, was parked there; but the car was not in sight (R. 12-13). It was known to agent Pocoroba that this car was being used by one Marvin Moses (R. 25-26), who lived at the premises to be searched.

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[2] The second count was the same except that the morphine sulphate was alleged to have been contraband because knowingly imported or brought into the United States contrary to law, 21 U.S.C. 174. The court below did not deal with the second count separately because it sufficed to sustain the seizure that the Government had made its case under the first count (R. 82).

During the search conducted pursuant to the warrant, the agents discovered a steamer trunk containing 1486 grains of heroin in capsules and bulk, seven-half ounces of heroin in a glass jar, and 2800 grains of cocaine in capsules and bulk (R. 11). About 30 minutes after their entry and before the search was completed, Marvin Moses entered the premises, identified himself, and admitted sole ownership of the steamer trunk and its contents (R. 11). He was immediately placed under arrest and searched. The agents found in one of the pockets of the sport coat which he had been wearing when he entered the premises, 40 tablets of morphine sulphate in a small, plain, white pasteboard box with no stamps of any kind on it (R. 11, 22). Sojat asked Moses if he were using narcotics "and he said no. And I asked him, 'What about these forty tablets?' He said that 'they are for somebody else.' I said, 'How much are these selling for?' He said, 'A dollar and a half apiece.' " (R. 22.) Sojat also asked Moses how he came to the building and Moses replied that "* * * he just drove up in his car and pointed out the front window towards the car parked in the vicinity. He had on his person the keys to this automobile * * *" (R. 22).

Following this conversation, the Government seized the car and subsequently filed this libel seeking its forfeiture (R. 3-5).

Petitioner, the wife of Marvin Moses, appeared as claimant, but offered no evidence (R. 26).

The District Court ruled that it would not consider Sojat's testimony that Marvin Moses admitted just arriving in the car, because it was hearsay and not admissible against the car under any exceptions to the hearsay rule. Consequently, it held that there was no competent testimony that Moses ever rode in the libellee automobile; or that, if he did so, he carried narcotics with him (R. 53). It also ruled that it could not presume from the mere fact that the tablets taken from Moses were in an unstamped container that they were either purchased in or from an unstamped container, or that they had been unlawfully imported, or that they had been transported in the subject vehicle (R. 56). The court concluded that there was no showing of probable cause for institution of proceedings against the automobile and entered judgment for its delivery to petitioner (R. 57).

On appeal from this judgment, the Court of Appeals held that probable cause for the institution of this suit depended on two things: probable cause to believe that the morphine sulphate seized was "contraband," and probable cause to believe that the libellee automobile was used to transport it. On the first, it held that in the circumstances of this case, it was proper to invoke the presumption of Section 2553(a) of the Internal Revenue Code that the possession of unstamped narcotics means that the narcotics were unlawfully purchased, and therefore contraband, even though

that section merely imposes individual criminal responsibility on persons found possessing narcotics (R. 78-80). On the second point, the court held that there was probable cause to believe that the libellee automobile had been used to transport the narcotics, even though it agreed with the District Court that the declarations of Marvin Moses that he "just drove up in his car", see p. 8, *supra,* were not properly usable against the libellee as "spontaneous declarations" or "res gestae" (R. 80-81). It held that the findings of fact of the District Court were clearly erroneous, reversed the judgment, and remanded the case with directions to enter a decree of forfeiture (R. 83). One judge dissented (R. 82).

ARGUMENT

The underlying assumption of all of petitioner's arguments is that proof of "probable cause" is equivalent to proof of guilt in a criminal trial. This assumption is erroneous.

The words "probable cause" have a long history of use in many contexts. The many cases dealing with their meaning show that "probable cause" is not equivalent to a prima facie case, although it plainly means more than a suspicion of guilt. See *Locke* v. *United States,* 7 Cranch 339, 347-348; *Wood* v. *United States,* 16 Pet. (U.S.) 342, 366; *Moore Ice Cream Co.* v. *Rose,* 289 U.S. 373, 381; *Carroll* v. *United States,* 267 U.S. 132, 161. In

Brinegar v. *United States*, 338 U.S. 160, 175, this Court recently said:

> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt." * * *

The view that the standard of "probable cause" is reasonable ground for belief of guilt is consistent with the legislative history of the Supplemental Forfeiture Act of 1939, 49 U.S.C. 781-788, pursuant to which the present action was brought. Congress sought to strike at the narcotics traffic and make it less profitable by seizing the necessary tools of the trade, particularly the vehicles which made it easy to transport narcotics quickly without attracting suspicion. See H. Rep. 1054, 76th Cong., 1st sess., pp. 2-3. The necessity of such seizures to the effective administration of the narcotics laws, coupled with the difficulty of establishing as a matter of fact that an auto was in fact used to transport narcotics, indicates clearly than Congress intended no rigid standard of "probable cause."[3] Rather, it would appear

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[3] Moreover, subsections (1), (2) and (3) of Title 19, U.S. Code, Section 1615 (defining the burden of proof in forfeiture proceedings, see Statutes Involved, pp. 4-5, *supra*), set forth certain prima facie rules of proof which are also expressive of a congressional view that a heavy burden is properly placed on those whose vehicles or vessels are used in circumstances indicating a violation of the laws giving rise to forfeiture.

that Congress thought it was fair to require the owner of a vehicle, who ought to have ready access to the facts, and certainly has control over the vehicle, to come forward with an explanation, once it seems probable that the vehicle was used for an unlawful purpose. Indeed, there would be no real meaning to a provision shifting the burden of proving the complicity of the car if the standard of probable cause were as high as petitioner contends.

Thus, it suffices to sustain the forfeiture here that it seems likely, in all the circumstances, as the court below held, that Moses had obtained the narcotics unlawfully and that he had transported them in the car. Compare *United States* v. *One 1937 Hudson T. Coupe, Etc.*, 21 F. Supp. 600, 603 (W.D. Ky.). And since the District Court, in making its findings, applied an erroneous standard of "probable cause," the court below was warranted in reversing those findings as clearly erroneous.

1. The court below properly held that there was probable cause to believe that the narcotics found on Moses had been unlawfully obtained.

Petitioner argues that the court below was in error in permitting reliance in a forfeiture proceeding on the presumption of Section 2553(a) of the Internal Revenue Code, that the mere possession of unstamped narcotics is prima facie evidence that the drugs are unlawfully possessed.

She further argues that, without this presumption, there was no probable cause to believe that her husband had obtained the narcotics unlawfully. We submit that petitioner is wrong in both contentions.

a. In *Casey* v. *United States,* 276 U.S. 413, this Court held that the presumption created by a statute similar to Section 2553(a) was a rational one, i.e., reasonable in light of common experience. Cf. *Yee Hem* v. *United States,* 268 U.S. 178; *Copperthwaite* v. *United States,* 37 F. 2d 846 (C.A. 6). The fact that Congress legislated only with respect to criminal proceedings does not lessen the reasonableness of the inference from possession when it occurs in other situations.

If the unstamped condition of narcotics can be used as prima facie evidence of unlawful possession in a criminal case against an individual, then it must surely be a proper basis for the institution of this proceeding where the controlling statute requires only "probable cause" for belief in guilt.[4] The objection that there cannot be a presumption against an inanimate object is specious. Section 2553(a) is not used mechanically for its presumption, but as evidence of a reasonable and authoritative view of common experience. The character of the ultimate respondent has no relevance to the reasonableness of the inference

[4] Indeed, their unstamped character may itself make the narcotics contraband, 49 U.S.C. 781(b), *supra,* p. 3.

arising from the possession of unstamped narcotics that they were unlawfully possessed. See *United States* v. *One 6-54-B Oakland Touring Automobile,* 9 F. 2d 635, 636 (D. Ariz.).[5]

b. Moreover, without reference to Section 2553(a), it was shown here that experienced narcotics officers had just discovered Moses in possession of substantial amounts of narcotics, of widely varying kinds which Moses admitted he owned. In the circumstances, it is absurd to suppose that they were possessed legally. This fact alone separates Moses from the small class of people who might be expected to have acquired 40 tablets of morphine sulphate lawfully, and justifies the assumption that the tablets were unlawfully obtained.

In addition, Moses told the officers that the tablets were not for himself, but for "somebody else" and that they were selling for a "dollar and

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[5] Of the cases which are apparently contrary to the position of the court below it will be noted that one, *United States* v. *One Nash Coupe,* 47 F. 2d 249 (N.D. Ill.) is a decision of a District Court sitting in the circuit of the court below, and therefore must be regarded as no longer law even in the court which rendered it; and that another, *United States* v. *One Studebaker Roadster,* 40 F. 2d 557 (D. Tenn.) is the decision of a District Court in a circuit which has indicated that it would adopt the broader view taken in the court below. See *General Motors Acceptance Corp.* v. *United States,* 63 F. 2d 209, 210 (C.A. 6).

a half apiece" (R. 22).[6] This would seem clearly to justify the conclusion that Moses was in commercial narcotic operations, and the further conclusion that any narcotics he had were unlawfully obtained.

2. There was also probable cause to believe that Moses had used the libellee automobile to transport the seized narcotics.

a. The court below so found even though it ruled that the statement by Moses to the agent that he had just driven up in his car was properly excluded by the trial judge as hearsay. This conclusion is fully supported by the evidence the court deemed properly before it.

The agents, at least one of whom was familiar with Moses' car, had examined the vicinity approximately 30 minutes before Moses' arrival and had not seen the car. Immediately after Moses' arrival the car could be seen from the window of the premises. While it is conceivable that Moses could have obtained narcotics after he got out of the car, the probabilities, in view of the short time involved, are clearly the other way. The cache already discovered indicated that Moses was operating in the narcotics business on a fairly large scale and was himself avoiding addiction. It would seem particularly unlikely

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[6] The admissibility of this testimony depends on the same considerations as are discussed below, pp. 16-17.

that such a person would do business casually on the open street. And yet, so small a gap of time occurred that this would be almost a necessary alternative if Moses did not carry the drugs in the libellee auto. At the very least, the nature of this alternative indicates the strong likelihood that the car was used, as charged, and thereby clearly shows "probable cause."

b. The statement by Moses after narcotics were found on his person that he "just drove up in his car," if admissible would, of course, be further convincing evidence tending to establish "probable cause" to believe that Moses had carried narcotics in the car. We submit that the court below unduly limited itself in failing to consider this statement on the ground that it was hearsay as to the car.

Hearsay evidence is admissible to show the existence of probable cause, for the simple reason that that is often the kind of information that reasonable men act on. Special protections necessary to protect the fact finder in a trial are not relevant. The truthfulness of Moses' statement is not the issue. The only issue is whether it was reasonable for the narcotics agents to believe that Moses was telling the truth. If it was, the statements certainly added to the warrant for instituting the proceeding. Cf. *Commercial Credit Corporation* v. *United States,* 58 F. 2d 195 (C.A. 2).

In the *Brinegar* case, *supra,* this Court said, at p. 175:

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

See also, *United States* v. *Bianco,* 189 F. 2d 716, 720, 721 (C.A. 3); *United States* v. *Li Fat Tong,* 152 F. 2d 650, 652 (C.A. 2).

The decision of the court below is thus based on a view of the evidence more favorable to petitioner than the applicable rules of law require.[7]

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[7] The conviction could also be sustained under the other charge of the Government's libel on essentially the same basis. There is some basis to believe that any morphine sulphate present in this country is imported. See *General Motors Acceptance Corporation* v. *United States,* 63 F. 2d 209, 210 (C.A. 6). Moreover, section 174 of Title 21 places the burden on a defendant in a criminal prosecution of showing that narcotics were not imported. So far as the case involves probable cause for assuming the car was thus used, the two counts raise the same problem.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1952.

★ U.S. GOVERNMENT PRINTING OFFICE 1952—206939/P.O.1203